IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 02ND DAY OF NOVEMBER 2018

THE HON'BLE MR. JUSTICE C.SARAVANAN

O.P.No.416 of 2018

In the matter of the Arbitration and Conciliation Act 1996
and
In the matter of Foreign Award dated 9 April 2017 and 6 August 2017 between Pueblo Holdings Inc. And Emirates Trading Agency LLC

PUEBLO HOLDINGS LIMITED,
having its registered office at
Trust Company Complex,
Ajeltake Road, Ajeltake Islands,
Majuro MH96960
Marshall Islands ...Petitioner

-vs-

1.EMIRATES TRADING AGENCY LLC,
A Company incorporated under
the appropriate Laws of the
United Arab Emirates
having its registered office
and/or business address at ETA
Star House, Salahuddin Road,
Deira, Dubai, United Arab Emirates

(*) 2.ETA PORT OPERATIONS AND RAPID TRANSPORT SYSTEM LIMITED,
A company incorporated under the Companies Act, 1956 having its registered office at
Buhari Towers, 6th Floor,
#4 Moores Road, Chennai TN 600006

(*) 3.ETA Engineering Pvt.Ltd,
A company incorporated under the Companies Act 1956 having its registered office at New No.71

Old No.63, 3rd Floor,
Sterling Road, Nungambakkam,
Chennai 600 034 **...Garnishees**
(*) Respondents 2 & 3 are
struck off as per order
dated 02.11.2018 on memo in O.P.No.416 of 2018.

Original Petition praying that this Hon'ble Court be pleased to pass an order to declaration that the Foreign Awards dated 9 April 2017 and 6 August 2017 published by the arbitral tribunal consisting of the sole arbitrator, Mr.David Farrington be made enforceable as a decree of this Hon'ble Court in terms of Chapter 1, Part II, of the Arbitration and Conciliation Act, 1996.

b. For costs of this Arbitration Petition.

This Original Petition coming on this day before this Court for hearing the court made the following order:-

The above OP has been filed under Sections 44, 47, 48 and 49 of the Arbitration and Conciliation Act, 1996, for the following relief:-

> a) to declare that the Foreign Awards dated 9th April 2017 and 6th August 2017 published by the arbitral tribunal consisting of the sole arbitrator, Mr.David Farrington be made enforceable as a decree of this Hon'ble Court in terms of Chapter 1, Part II, of the Arbitration and Conciliation Act, 1996;
>
> b) For costs of this Arbitration Petition; and
>
> c) For such orders and further reliefs that this Hon'ble Court may deem fit and proper in the facts and circumstances of the case;"

2.The above O.P was listed for admission on 28.4.2018.

Notice was ordered and the above case was directed to be listed along with **O.A. Nos.397 and 398 and A.No.3570 of 2018** on 21.6.2018.

3.There are intra corporate dispute between the shareholders of the 1st respondent company belonging to a group called ETA group and has resulted in de-consolidation. The 1st respondent remained exparte in most of the proceedings.

4.O.A No.772 of 2018 has been filed by the petitioner to restrain the respondent therein (individuals) from transferring shares held in beneficial capacity for the 1st respondent. There also the 1st respondent has remained absent. The said application was heard finally on 12.10.2018 and has been now reserved for passing orders.

5.Though all the above cases were listed together, they were delinked and heard eparately. O.A. Nos.397 and 398 and A.No.3570 of 2018 are yet to be heard.

6.The 1st Respondent holds shares in 2nd and the 3rd Respondent companies and it is these shares which the Petitioner seeks to attach in the collateral proceedings. To enable the petitioner to enforce the award effectively the petitioner has filed the present petition.

7.The 2nd and the 3rd respondents have filed a common counter, stating that they are neither necessary nor proper parties to the present petition and therefore petition is not maintainable against them. It was stated that the arbitral awards claimed to have been passed pursuant to an Arbitration Agreement in a charter party is subject to the UK Arbitration Act, 1996 and the 2008 Rules of the London Maritime Arbitrator's Association, between the petitioner and the 1st respondent and therefore the present petition was without jurisdiction. It is further stated that a duly authenticated copy of the award, duly published under the LMAA terms has not been filed along with the present petition. This is sine qua non for invocation of Section 47 of the Act. Hence, the present petition is not maintainable.

8.The 2nd and 3rd respondents have raised several other objections to the maintainability of the present petition on the ground that they were not aware of any proceedings or any appointment of arbitrator at all and therefore, if the petitioner seeks to enforce the arbitral award against the respondent, the petitioner should abide a condition under Section 48 of the Act. At the same time, the 2nd and the 3rd Respondents stated that they were neither necessary nor proper parties to the present petition.

9.In view of the above stand of the 2nd and the 3rd

Respondent, petitioner has filed a memo giving up the 2nd and 3rd respondents giving up the names of the 2nd and the 3rd Respondents. Accordingly, name of the 2nd and 3rd respondents are directed to be struck off. Thus, only the 1st Respondent remains as the sole Respondent in the present case.

10.The 1st respondent who is now the sole Respondent has remained absent in the collateral proceeding has also not entered appearance in the present petition also.

11.The present petition for enforcement of award under Part II of the Act is to be decided in absence of the 1st respondent as the 1st respondent remains absent in all the proceeding including the present proceeding, in background of the intra-group dispute of which the 2nd and the 3rd respondents are constituents.

12.The short point for consideration in the present petition is whether the two awards are enforceable under Part II of the Act without the participation of the only respondent who holds shares in the 2nd and the 3rd respondents.

13.The petitioner has complied with the requirement of Section 47 of the Act by filing certified copy of the award and the original arbitration agreement. Therefore, the petitioner has crossed the first hurdle and is therefore required to cross the second hurdle under Section 48 of the Act for enforcing the award.

14.Section 48 of the Arbitration and Conciliation Act, 1996 contemplates satisfaction of certain conditions prescribed for enforcing a foreign award. As there is no representation on behalf of the 1st respondent, who is now the only respondent to object to the enforcement of the awards Sub-Section (1) to Section 48 is not attracted.

15.At the same time, the Court can refuse to enforce the award under Sub-section (2) to Section 48. Relevant portion of Section 48(2) reads as under:-

> ***"2. Enforcement of an arbitral award may also be refused if the Court finds that -***
>
> ***(a) the subject - matter of the difference is not capable of settlement by arbitration under the law of India; or***
>
> ***(b) the enforcement of the award would be contrary to the public policy of India.***
>
> ***[Explanation 1 - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, -***
>
> ***(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or***
>
> ***(ii) it is in contravention with the fundamental policy of Indian law; or***
>
> ***(iii) it is in conflict with the most basic notions of morality or justice.***
>
> ***Explanation 2 - For the avoidance of doubt, the test as to whether there is a contravention with***

the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]"

16.The learned counsel for the petitioner drew my attention to the decision of the Hon'ble Supreme Court in **Brace Transport Corporation of Monrovia, Bermuda Vs. Orient Middle East Lines Ltd., Saudi Arabia and others** (1995) Supp SCC 280. There, the Court after referring to New York Convention observed that where a court is asked to enforce an award, it must recognise not only the legal effect of the award but must use legal sanctions to ensure that it is carried out.

17.The Court also referred to Law and Practice of International Commercial Arbitration by Redfern and Hunter, which reads as under:

> "A party seeking to enforce an award in an international commercial arbitration may have a choice of country in which to do so; as it is sometimes expressed, the party may be able to go forum shopping. This depends upon the location of the assets of the losing party. Since the purpose of enforcement proceedings is to try to ensure compliance with an award by the legal attachment or seizure of the defaulting party's assets, legal proceedings of some kind are necessary to obtain title to the assets seized or their proceeds of sale. These legal proceedings must be taken in the state or states in which the property or other

> assets of the losing party are located."

The Court also reproduced the following passage:

> "In other words, the place or arbitration will have been chosen as a neutral forum. It will be rare for the parties to have assets situated within this neutral country; and the award if it has to be enforced must generally be enforced in a country other than that in which it was made. This is why it is so important that international awards should he recognisable and enforceable international, and not merely in the country in which they are made; moreover, unlike (he place of arbitration, the place of recognition and enforcement will not be chosen by or on behalf of the parties. It will depend upon the circumstances of each particular case."

18.Thus, it is clear that for enforcement of an award multiple proceedings can be initiated in a different jurisdiction wherever assets of the award debtor are located. In fact, in the context of domestic arbitration, the Hon'ble Supreme Court recently in its decision in **Sundaram Finance Ltd., Vs. Abdul Samad and another** (2018) 3 SCC 622 observed as follows:

> "**20.** We are, thus, unhesitatingly of the view that the enforcement of an award through its execution can be filed anywhere in the country

> where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the court, which would have jurisdiction over the arbitral proceedings."

Before concluding, the Court also held as follows:-

> "Thus, when an award is already made, of which execution is sought, the arbitral proceedings already stand terminated on the making of the final award. Thus, it is not appreciated how Section 42 of the said Act, which deals with the jurisdiction issue in respect of arbitral proceedings, would have any relevance. It does appear that the provisions of the said Code and the said Act have been mixed up."

19.The learned counsel for the petitioner also drew my attention to the decision of the Hon'ble Supreme Court in **Fuerst Day Lawson Ltd., Vs. Jindal Exports Ltd.,** (2001) 6 SCC 356 wherein the Court in para 31 compared the law before and after passing of the Arbitration and Conciliation Act, 1996. The Court observed as follows:

> "The only difference as found is that while under the Foreign Award Act a decree follows, under the new Act the foreign award is already stamped as the decree. Thus, in our view, a party holding foreign award can apply for enforcement of it but the court before taking further effective steps for the execution of the award has to proceed in accordance with Sections 47 to 49. In one

proceeding there may be different stages. In the first stage the Court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court/decree again. If the object and purpose can be served in the same proceedings, in our view, there is no need to take two separate proceedings resulting in multiplicity of litigation. It is also clear from objectives contained in para 4 of the Statement of Objects and Reasons, Sections 47 to 49 and Scheme of the Actthat every final arbitral award is to be enforced as if it were a decree of the court. The submission that the execution petition could not be permitted to convert as an application under Section 47 is technical and is of no consequence in the view we have taken. In our opinion, for enforcement of foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make rule of the court or decree and the other to take up execution thereafter. In one proceeding, as already stated above, the court enforcing a foreign award can deal with the entire matter. Even otherwise, this procedure does not prejudice a party in the light of what is stated in para 40 of the **Thyssen** judgment.”

20.In the present case, the first respondent has now become the sole respondent, who holds 99.34% of the shares in the 2nd respondent company and about 23% in the 3rd respondent’s company, which have been given up for the purpose of enforcement of the award.

21.Though as per the decision of the Hon’ble Supreme Court in **Fuerst Day Lawson Ltd., Vs. Jindal Exports Ltd.,** (2001) 6 SCC 356, it has been observed thus “In one proceeding there may be different stages. In the first stage the Court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court/decree again. If the object and purpose can be served in the same proceedings, in our view, there is no need to take two separate proceedings resulting in multiplicity of litigation.” The petitioner has asked for a limited relief for a declaration. In this petitioner has not asked for enforcement. I am satisfied that in the absence of any contra submission on behalf of the respondent, the award is enforceable under Part-II in Chapter I of the Arbitration and Conciliation Act, 1996.

22.Accordingly, the application is allowed as prayed for. No costs.

Sd/-C.S.N.J
02.11.2018

//Certified to be a true copy//

Dated this the day of 2018
JJ 12/12/18

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.